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AMERICAN JUDGES in the last quarter of the twentieth century have faced perhaps the most extraordinary and bewildering array of problems demanding decision that has been presented to any group of people in recorded history. The questions posed to fallible men and women who claim no supernatural wisdom or divine guidance have included such issues as the right to die,[1] limitations on liability for nuclear explosions,[2] the right of citizens to know what their public officials say and do,[3] the obligation of individuals to breach confidences,[4] the responsibility of manufacturers to persons unknown to them,[5] the duty to protect plant and animal life,[6] the right of the public to control scientific experimentation,[7] the right of the citizen to obtain psychiatric care,[8] and to be

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1. *In re* Quinlan, 70 N.J. 10, 355 A.2d 647 (1976).

2. Carolina Environmental Study Group, Inc. v. United States Atomic Energy Comm'n, 431 F. Supp. 203 (W.D.N.C. 1977), *appeal docketed*, No. C-C-73-139 (4th Cir. Mar. 31, 1977).

3. Freedom of Information Act, 5 U.S.C. § 552 *et. seq.* (1967); Department of the Air Force v. Rose, 425 U.S. 352 (1975); NLRB v. Sears, 421 U.S. 132 (1975).

4. Branzburg v. Hayes Newspaper Reporter, 408 U.S. 665 (1972).

5. Restatement (Second) of Torts § 402a (1967); Garthwait v. Burgio, 153 Conn. 284, 216 A.2d 189 (1965); Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965); Cintrone v. Hertz Truck Leasing and Rental Service, 45 N.J. 434, 212 A.2d 769 (1965); Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966).

6. United States v. SCRAP, 412 U.S. 669 (1973); Sierra Club v. Morton, 405 U.S. 727 (1972).

7. *See, e.g., New York Senate Bill to Require State Health Commissioner to Establish Regulations for Recombinant DNA Research*, N.Y. Times, June 16, 1977, at B6, col. 3; *see also* N.Y. Times, June 20, 1977, N.J., at 23, col. 5.

8. Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966).

free from noise, pollution, and unsightliness,[9] and the obligation of society to redress historic wrongs by granting contemporary advantages.[10] American judges, moreover, are still faced with the age old problems of guilt or innocence, the determination of appropriate penalties, problems of personal and property rights, and the fashioning of remedies for the invasion of such rights.

The United States among nations has the greatest number of laws, lawyers, and judges, the greatest quantum of litigation,[11] and the highest rate of crime. The behavior of people in a free democratic nation cannot be meaningfully compared with that of people living under dictatorships where violations of law are frequently punishable by death or imprisonment without trial or without even the rudiments of due process. Nonetheless, crime statistics in the United States are dismaying.[12] The number of police officers,[13] the prison rolls,[14] and the quantity of resources allocated to law enforcement[15] continue to escalate.

The classic American rationale for obedience to law is the mythic concept, "the rule of law."[16] This rationale has proved to be inade-

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9. British Airways Bd. v. Port Auth. of N.Y. and N.J., 562 F.2d 37 (2d Cir. 1977).

10. Regents of the Univ. of Cal. v. Bakke, 98 S. Ct. 2733 (1978); DeFunis v. Odegaard, 416 U.S. 312 (1974).

11. *See* N.Y. Times Nov. 16, 1977, at A28, col. 1, *quoting* Hale Champion, Under Secretary, HEW. "There is more surgery in the United States today than there ought to be . . . there are many thousands more surgeons than we need . . . excess surgeons lead to excess surgery . . . ." There are more than 100,000 students in law school today. Recent law graduates are finding increasing difficulty in obtaining employment. One might conclude that excess lawyers leads to excess litigation.

12. It is estimated that in 1976 there were 11,304,800 incidents of crime in the United States. U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 35 (1977).

13. In 1961, the total number of policemen employed nationally was 189,093. U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS 1956-65, at 108 (1962). In 1969, the number had risen to 254,984. U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS 1969-71, at 148 (1972).

14. Approximately 250,000 persons as of this writing are in custody in the United States. In 1970, there were 196,429 in prison; in 1955, there were 185,780 in prison. BUREAU OF THE CENSUS, U.S. DEP'T OF COMM., HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES—1970, at 420 (1971).

15. National public expenditures on police protection activities were: in 1954—$2,080,000,000; in 1960—$3,349,000,000; in 1970—$8,571,000,000. *Id.* at 416.

16. The debate over natural law and positive law is beyond the scope of this Article. *See* J. HALL, FOUNDATIONS OF JURISPRUDENCE (1973).

quate; the concept of the "rule of law" has not engendered a strong collective morality dedicated to lawful conduct. The author, as a trial judge, has observed that persons convicted of crime[17] frequently lack a sense of wrongdoing, contrition, or sin.[18] Indeed, there are those engaged in the administration of the criminal justice system who have apparently repudiated the concept of sin.[19]

There is little consensus as to what is right and what is wrong, what is justifiable and what is reprehensible. What is evident is a widespread dissatisfaction with the law and the administration of justice.[20] Certainly the disparities in sentencing, the often arbitrary prosecution of the accused persons, and rapid fluctuations in the law, as well as a sense of anomie, are, in part, responsible for this attitude. In addition, the public is seriously divided by such social issues as abortion, busing, and pornography. There is little agreement on

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17. This experience includes presiding over more than fifty homicide trials, several hundred felony trials, countless misdemeanor cases, and representation as attorney of more than 3,000 clients accused of crime. Of course, many of these defendants claimed to be innocent. Many, however, admitted committing the acts of which they were accused. These defendants included powerful politicians, wealthy and indigent adults and children.

18. *See* K. MENNINGER, WHATEVER BECAME OF SIN? 220-21, 228 (1973). Note that Karl Menninger, the eminent psychiatrist, concludes this book with a plea to the clergy. *See also* LEWIS, GOD IN THE DOCK, ESSAYS ON THEOLOGY AND ETHICS (1970).

19. *See* VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS, REPORT OF THE COMMITTEE FOR THE STUDY OF INCARCERATION (1976). The committee was composed of Charles E. Goodell, former United States Senator; Marshall Cohen, Professor of Philosophy; Samuel Dubois Cook, President of Dilliard University; Alan M. Dershowitz, Prof. Harvard Law School; Dr. Willard Gaylin, psychoanalyst; Prof. Erving Goffman, Univ. of Pa.; Prof. Joseph Goldstein, Yale Law School; Jorge Lara-Braud, Exec. Dir. Comm. on Faith and Order; Victor Marrero, First Ass't Counsel to Gov. of N.Y.; Eleanor Holmes Norton, N.Y. City Comm'n on Human Rights; Prof. David J. Rothman, Columbia Univ.; Prof. Simon Rottenberg, Univ. of Mass.; Prof. Herman Schwartz, State Univ. of N.Y.; Prof. Stanton Wheeler, Yale Law School; Prof. Leslie T. Wilkins, State Univ. of N.Y. The Report attempts to establish a rationale for the imposition of penalties for violation of criminal laws, phrased as imposing "Just Deserts in an Unjust Society." Professor Wilkins complains, "It seems that we have rediscovered 'sin' in the absence of a better alternative!" *Id.* at 178. The Committee, so far from rediscovering sin, concludes that "someone who is responsible for wrongdoing is blame*worthy* and hence may justly be blamed." *Id.* at 49.

20. Note the statement of Justice Stevens writing for a unanimous court in denying social security benefits to a disabled person suffering from cerebral palsy, that "rules produce seemingly arbitrary consequences in some individual cases." Califano v. Jobst, 434 U.S. 47 (1977).

such fundamental questions as the propriety of lying,[21] stealing,[22] and killing.[23]

A concerted effort by all segments of the legal system is required to make the laws and the manner of their implementation[24] fairer for all citizens. The judiciary has special obligations to make the administration of law honest, credible, and responsible.[25]

The author proposes certain limited steps that the judiciary could take to restore confidence in the litigation process. Justice must not only be done; it must be seen to be done. Except for police officers, judges are the most visible constituents of the justice system. Judges

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21. Richard Helms, former Director of CIA, was convicted of lying to a United States Senate Committee and was sternly rebuked by the judge. Helms declared, "I don't feel disgraced at all" and declared that the conviction was a badge of honor. Helms was acclaimed by CIA employees. N.Y. Times, Nov. 5, 1977, at 1, col. 2.

22. Compare the varying reactions to the widespread looting during the blackout in New York in July, 1977. Some persons referred to looters as "scum and animals"; others such as Prof. Gutman and the N.Y. Times looked upon it as an inarticulate cry for social justice. More than 3,700 people were arrested and 418 police were injured. N.Y. Times, July 17, 1977, § 4, at 1, col. 6.

23. See the wide divergence of opinion with respect to the conviction and guilt of Lt. William L. Calley, Jr., N.Y. Times, June 25, 1974, at 8, col. 3; *id.*, April 26, 1974, at 36, col. 7; *id.*, March 4, 1974, at 28, col. 1.

24. It is unnecessary to point out the disadvantages faced by the poor in obtaining legal counsel and access to the courts. One must recognize that while the landmark decisions in Gideon v. Wainwright, 372 U.S. 335 (1963), and *In re* Gault, 387 U.S. 1 (1968), have provided defendants with a warm body with a legal degree, the decisions have by no means equalized the standing of the poor defendant in court. The denial of access to the courts to the poor continues with the approval of the United States Supreme Court. *See, e.g.*, United States v. Kras, 409 U.S. 434 (1973) (holding that indigents have no right to file a petition in bankruptcy without paying a filing fee); Ortwein v. Schwab, 410 U.S. 656 (1973) (upholding requirement of a twenty-five dollar filing fee to appeal a reduction in welfare payments).

25. Discontent is voiced by members of the clergy and the legal profession. Organized religion is troubled by the disobedience of its adherents. Catholics openly flout the teachings of the church on such issues as birth control, abortion, divorce, and discontinuance of Latin in the liturgy. Protestants have defied church rulings with respect to ordination of women. Every sect and denomination faces refusal of sizable numbers to obey authority. Members of the clergy are going to law school in increasing numbers. And lawyers are going to divinity schools. Each profession recognizes its own weakness in bringing about a more just social order and turns to the other with misguided hope. As Professor Harold Berman points out, the problem is how religion today can "command sufficient authority to carry forward into a new age the great principles of Western jurisprudence." BERMAN, THE INTERACTION OF LAW AND RELIGION 72 (1974). See the obverse of the problem as stated by this author. FORER, THE DEATH OF THE LAW (1975). Neither law nor religion will accomplish its aims merely by an exchange of personnel. Both must find a more rational and acceptable basis for commanding obedience than mere reliance on authority.

act in courtrooms open to the public and the press. They are not anonymous bureaucrats but public officials who are invested with enormous powers and responsibilities. Their actions, when perceived to be arbitrary, short-sighted, or venal, contribute to public disrespect for law.

Decision-making power was not always vested in a class of civil functionaries known as the judiciary. In earlier times, people sought answers to individual and social problems from religious leaders. Depending upon the society, the religious authority was a seer, medicine-man, shaman, oracle, priest, or clergyman. For centuries both the power to judge, that is, to assess blame and impose punishment, and the power to heal were presumed to require divine or supernatural powers. In time, the practice of medicine became a secular art, as did the judicial function.

In societies that had or have a state religion, the dichotomy between religious or moral decisions and civil or governmental decisions is still not clearly defined. The law may embody the teaching of the established faith. In fundamentally secular America, however, individuals faced with difficult personal decisions frequently solicit the counsel and support of both organized religion and the state. For example, the parents of Siamese twins, before going to court for an order to permit surgical severance of the children, surgery which would result in the death of one, obtained religious sanction.[26] In the same spirit, many persons seek both a civil and a church sanctioned divorce.

Even in a pluralistic society, however, the ties between church and state may be extremely close. In America the clergy are commissioned as officers to serve as chaplains in the armed forces. Clergy are also hired by civil authorities to work in prisons. In both circumstances the clergy may have to counsel men concerning the civilly sanctioned taking of human life.

The clergy and the judiciary have strikingly different approaches to problem solving. Traditionally the priest consults divine or supernatural authority. For Roman priests the answers were revealed in the entrails of dead birds. For seers and prophets revelation was found in trance-like seances which usually took place in the desert or the mountains. Contemporary religious leaders may consult scriptures or seek revelation through prayer. Whether it is believed that the scriptures were written or revealed by the divinity or by an in-

26. Philadelphia Inquirer, Oct. 16, 1977, at 1A.

spired holy person, they have an imprimatur of more than human wisdom. The priest's power is based on divine will.

Judges possess no such attributes. They do not claim special virtues or the capacity of divine insight or authority. The judge's power is derived from the state pursuant to wholly secular documents such as constitutions, and he or she must depend upon individual scholarship and temperament as a source of insight. Constitutions, statutes, decisions, and other authorities upon which the judiciary relies under the rubric of stare decisis are thought to flow from human wisdom, not divine authority.

Unlike the role of the priest, under our adversary system of litigation, judges are not conciliators or arbitrators. Judges have very limited choices. Most decisions displease at least one party. In controversial cases in which strong views are held, widespread public dissatisfaction and dismay may arise as the result of an unpopular decision.

What force do judges implicitly rely upon when it is essential to compel Americans to abide by decisions which violate their sense of justice or morality? The disputes of anthropologists over whether primitive society is regulated by law or custom provide some insight.[27] As a general postulate, customs evidencing reciprocal obligations and benefits did generally induce voluntary compliance with communal standards of behavior in primitive societies. There were, however, individuals who for strong personal reasons, impulse, or simply lack of self control violated well understood taboos. Proscribed behavior in primitive societies was predicated not upon enacted laws or decisions issued by an authority figure but upon a consensus as to what amounted to illicit behavior and widespead acceptance of specified punishment for certain transgressions. Such a behavioral consensus does not exist in American society today, and, therefore. judicial decisions often do not receive widespread acceptance.

It is necessary to examine the behavior, the obligations, and the limitations of the American judiciary to determine the manner in which judges by their actions might promote respect for court decisions and for legal institutions generally. There are approximately 20,000 judges in the United States.[28] Perhaps half of them are lay

27. *See* MALINOWSKY, CRIME AND CUSTOM IN SAVAGE SOCIETY (1932); Radcliffe-Brown, *Primitive Law*, 9-10 SELIGMAN & JOHNSON, ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 202 (1949).

28. There are no comprehensive statistics. However, as of 1971 there were 17,057 state and local courts. Many of these have more than one judge. Each of the fifty

magistrates or have a very limited jurisdiction. There are 660 federal judges and approximately 10,000 state judges of courts of record. Federal judges are appointed for life. Most state judges are either elected or appointed for life or for long terms of office. Judges may render decisions that violate the law, are venal, unfair, capricious or brutal. Unless, however, a judge is found taking money from the underworld or committing sodomy in a public place, there is little likelihood that he or she will be removed from office.

An ordinary criminal conviction does not necessarily occasion removal from the bench. Many state and local judges have been convicted of crimes. Many more have been investigated for behavior that offends fundamental standards of propriety and decency. Few have been impeached.[29] It is noted that the foregoing convictions were not for breach of standards of judicial conduct but for common crimes. The judges were tried like any other accused person and had the benefit of the presumption of innocence, the privilege against self-incrimination, and the requirement of proof of guilt beyond a reasonable doubt. The fact that some accused judges were not convicted is hardly a testimonial to fitness to serve on the bench. There is a great need to define what conduct short of a crime will subject a judge to discipline and removal.

There are several reasons for the judiciary's failure until recently to address the issue of professional ethics and responsibility. Because the judiciary is an independent branch of the government, there are constitutional impediments to imposition of standards of conduct or behavior on the judiciary by the legislature or the executive.[30] The judiciary is not, of course, precluded from setting standards for its own members.[31]

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states has a court of last resort of from five to nine members, one or more intermediate appellate courts composed of several members, and numerous trial courts of record that are usually created by district or on a multiple county basis.

29. *See, e.g.*, the account of the impeachment of United States Judge Halsted L. Ritter, judge for the Southern District of Florida in Cullen, *The Last Impeachment*, 49 FLA. B. J. 130 (1975). The enigmatic words "high crimes and misdemeanors" certainly are inadequate guides to judicial ethics.

30. *See* Holloman, *The Judicial Reform Act: History, Analysis, and Comment*, 35 LAW AND CONTEMP. PROB. 128 (1970) for a discussion of the constitutional problems with respect to legislation providing for discipline and/or removal of federal judges.

31. *See, e.g.*, JUDICIAL CODE OF PA. 42 Pa. C.S.A. § 3301 *et seq.* (1976), establishing a Judicial Inquiry and Review Board with power to order suspension, removal,

It is my view that judges have not addressed the problems of judicial ethics and judicial responsibility because they are overwhelmed by the torrents of day-to-day litigation, because they are naturally reluctant to criticize their peers, and, perhaps most importantly, because they are not threatened by malpractice lawsuits.[32]

Consumer litigation has forced business and the professions to adopt higher standards of ethical conduct. A quiet but dramatic legal revolution has taken place during the past three decades. For example, the old doctrine of caveat emptor, or let the buyer beware, has been replaced by a wholly new concept of products liability.[33] Industry may no longer manufacture unsafe goods and sell them with impunity. The ultimate consumer now has a right to recover damages from the manufacturer notwithstanding the presence of intermediaries in the distributive chain. The law now recognizes that industry has a duty to society.

A similar expansion in the realm of professional responsibility and liability has occurred. For centuries it was believed that even though lawyers were officers of the court, they owed a duty only to their clients. That is, a lawyer could not be held answerable in damages to anyone other than the retaining client, even in the event the lawyer's advice may have adversely affected others. Today, it is recognized that lawyers also owe a duty to the public,

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discipline, or compulsory retirement of judges. Many state courts have also adopted rules similar to the Code of Judicial Ethics. *See, e.g.*, PA. RULES OF COURT, CODE OF JUDICIAL CONDUCT; N.Y. CODE OF JUDICIAL CONDUCT, 29 Judiciary at 517 (Appendix) (McKinney 1975); CAL. CODE OF JUDICIAL CONDUCT, 23 Cal. Rules of Court 417, (Appendix).

32. But see the recent case of Sparkman v. McFarlin, 552 F.2d 172 (7th Cir. 1977). The court of appeals reversed a district court decision dismissing an action against Judge Harold Sturp. Sturp had ordered the sterilization of a fifteen-year-old girl upon the petition of her mother in an ex parte proceeding. The girl was alleged to be "somewhat retarded" although she had been attending public school. The lower court had ruled that the judge was "clothed with absolute judicial immunity." It is too early to know whether this case is a harbinger of "judicial malpractice suits." Legislators are also immune from liability. *See, e.g.*, Tenney v. Brandhove, 341 U.S. 367 (1951). Since their terms of office are relatively short and their conduct is searchingly examined by opposition candidates during election campaigns, legislators have been moved to adopt more stringent ethical codes for themselves. *But see* Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Institute, 500 F.2d 808 (D.C. Cir. 1976).

33. This concept was first enunciated in the RESTATEMENT (SECOND) OF TORTS § 402A (1967). Without legislative authority, it has been adopted as the law of most states.

to people they have never seen and from whom they have never received a fee. For example, lawyers have a responsibility to provide investors with accurate information in drafting securities registration statements for business clients.[34] Similarly, auditors and accountants in preparing annual reports are responsible to the public, not merely to the clients who retain them to perform audits.[35] Doctors are increasingly being held responsible not only for their own errors but also for mistreatment rendered by employees of the hospitals in which they place their patients. Social workers, therapists, and psychiatrists have been held to owe a legal responsibility to the families and acquaintances of the persons they treat. A psychiatrist has been held liable because his mentally disturbed patient killed a woman. The doctor had reason to know, as a result of what the patient told him, that the woman was in danger, yet he failed to warn her.[36] Even school teachers, whose contract is with the school district, have been sued by students on the ground that they failed effectively to teach these students.[37]

In all the foregoing cases, the old doctrine of privity of contract, that *A* owes a duty only to *B* with whom he has a contract, has been abrogated. The judiciary has recognized that others have a wider responsibility to the public and that broader standards of ethics and competence are required. The judiciary, without legislative mandate, has acted as the conscience of the community to protect the public in a highly specialized, technological, and impersonal society in which liability may arise in ways unanticipated by the parties or the legislature.

It would seem that the judges who have imposed such liability on others should examine their own role in society as well. Judges perform a public function; they should owe a duty to society generally. It is the thesis of this Article that such duty should be defined.

At present judges are guided by five vague mandates: (1) the oath of office; (2) the Constitution; (3) precedent, that is, what other courts have decided in similar cases; (4) a personal sense of justice; and (5) the canons of judicial ethics. The oath of office in some juris-

34. SEC v. Frank, 388 F.2d 486 (2d Cir. 1968).

35. Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976).

36. Tarasoff v. Regents of the University of California, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

37. Ianniello v. University of Bridgeport, N.Y. Times, June 29, 1977, at B4, col. 1.

dictions is as broad and simple as that taken by the President of the United States: "I do solemnly swear . . . that I will faithfully execute the Office of the President of the United States and will to the best of my ability, preserve, protect and defend the Constitution of the United States."[38] In other jurisdictions, oaths may take the form of degrading promises that the designated judge has not bought the office.[39] Neither type of oath provides much guidance to the judge.

The Constitution is subject to a wide latitude of interpretation and frequently offers little guidance. The vast majority of cases coming before the courts do not turn on constitutional issues nor are they often governed by clearly defined statutes. Most litigated cases do not fall within the precise ambit of precedent. Lawyers and litigants usually act reasonably. They do not litigate unless there is a fair probability of success. If the law is clear and there is no likelihood that the courts will change their previous rulings, parties are inclined to settle their disputes without resort to litigation. Consequently, precedent frequently does not present a clear guide to the perplexed jurist facing an unusual case or one of first impression.[40]

One's own sense of justice is not only difficult to define but may generally constitute an impermissible standard. A judge who derives authority solely from the state cannot predicate decisions primarily upon the teachings of a church or even upon concepts claimed to be immutable or coeval with God.[41] American law has in recent

38. U.S. CONST. art. II, § 1.

39. For example, the oath of office required by the Pennsylvania Constitution until the Amendment of May 17, 1966, read: "I do solemnly swear (or affirm) that I will support, obey and defend the Constitution of the United States, and the Constitution of this Commonwealth, and that I will discharge the duties of my office with fidelity; that I have not paid or contributed, or promised to pay or contribute, either directly or indirectly, any money or other valuable thing, to procure my nomination or election, (or appointment,) except for necessary and proper expenses expressly authorized by law; that I have not knowingly violated any election law of this Commonwealth, or procured it to be done by others in my behalf; that I will not knowingly receive, directly or indirectly, any money or other valuable thing for the performance or non-performance of any act or duty pertaining to my office, other than the compensation allowed by law." PENN. CONST., art. 6, § 3 (1874).

40. *See* MAIMONIDES, MOSES BEN MAIMON, THE GUIDE FOR THE PERPLEXED (1956 ed.).

41. *See* CICERO, LAWS, bk. II, §§ 4-5. According to Thomas Aquinas, God instructs man by means of divine law and grace. SUMMA THEOLOGICA, Part One of the Second Part, Question 90. Locke defined natural law as "being the decree of the divine will discernible by the light of nature and indicating what is and what is not in conformity with rational nature." LOCKE, ESSAYS ON THE LAW OF NATURE. In a secular society

years rather been dominated by pragmatism and the theory that the law is whatever the judge says it is.[42] Unless law and judicial constructions of it are perceived to be based upon concepts of morality and fairness, however, there arises no legitimate reason for obedience, other than the force of threatened penalty.[43]

As the public vacillates between its own desires and legal compulsion, so does the judiciary. Judges are torn between the mandate of positive law and sometimes conflicting beliefs in human rights. Under what circumstances, then, may a judge sworn to uphold the law violate the letter of it in pursuit of moral values? A negative response to the foregoing query reduces a judge to an amoral functionary, blindly endorsing crimes against humanity in the name of duty. An affirmative answer, on the other hand, leads to result-oriented decisions, perhaps popular at the moment but which time reveals to be unwarranted and also violative of basic rights as well as of positive law. Such yielding to popular feelings and social goals may result in short sighted decision making. Many decisions which conformed to contemporary feelings and social goals, beliefs that were also undoubtedly deeply held convictions of the judges and justices who rendered the decisions, reveal the dangers of relying upon individual concepts of right. For example, compulsory sterilization of mental defectives,[44] forcible relocation of Japanese from California,[45] compulsory flag salute,[46] indicia of intent as a decisive element in obscenity,[47] police misconduct as a ground for exclusion of reliable evidence.[48]

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in which atheists, agnostics, believers in spiritualism, astrology and arcane sects as well as adherents of all world religions are protected in their rights to believe or disbelieve, no judge could predicate a decision upon what he or she believed to be the decree of the divine will.

42. See Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 460-61 (1897) in which appears the oft-quoted statement: "But this limit of [legal] power is not coextensive with any system of morals . . . . The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." Note the changing fashions in American legal doctrine. *See* GILMORE, THE AGES OF AMERICAN LAW (1977). *See also* "The Ordinary Religion of the Law School," an address by Roger C. Cramton, Dean of Cornell Law School, delivered at a meeting of Committee on Law and Religion (CORAL) held at the Harvard Law School on March 5, 1977.

43. *See* BENTHAM, OF LAWS IN GENERAL (1970). *See also* Knowles, *Coercion and the Law*, in PERSPECTIVES IN JURISPRUDENCE (Attwooll ed. 1977).

44. Buck v. Bell, 274 U.S. 200 (1927).

45. Korematsu v. United States, 323 U.S. 214 (1944).

46. Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940).

47. Ginzberg v. United States, 383 U.S. 463 (1966).

48. Miranda v. Arizona, 384 U.S. 436 (1966).

A trial judge is not free to set aside precedent and positive law except when the failure to do so would result in the violation of basic human rights that are given constitutional protection.[49] Absent a constitutional right, a judge can only point to inequities by way of an opinion and hope that the affected party will present the issue, properly framed, to a higher court. In civil cases, the economically disadvantaged rarely can afford an appeal. Inevitably, in such cases, a judge must preside over injustice.[50] The notion of "fundamental fairness" is primarily limited to procedural questions, such as the right to a hearing and representation, and does not extend to substantive doctrine.[51]

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49. For example, I have refused to charge in the language of the statute and centuries of case law that the testimony of a rape victim, unlike that of other witnesses, must be received with caution; I have refused to enforce the statutory death penalty; I have ruled that all people, including women and children, have a right to bodily integrity regardless of familial relationships or the claims of medical or psychiatric practice. These are very rare and exceptional cases.

50. Prior to the recent Supreme Court decision in Fuentes v. Shevin, 407 U.S. 67 (1972), *reh. denied,* 409 U.S. 902 (1973), trial courts could not allow for the unequal positions of an impoverished, semi-literate borrower and a sophisticated lender. *Cf.* the unequal positions of the academically disadvantaged with the well educated. DeFunis v. Odegaard, 416 U.S. 312 (1974); Regents of the Univ. of Cal. v. Bakke, 98 S. Ct. 2733 (1978).

Innumerable situations arise in routine litigation in which disadvantaged and handicapped individuals are held to the standards designed for the average person. *See, e.g.,* Canterbury v. Spence, 464 F.2d 772, *cert. denied,* 409 U.S. 1064 (1972), holding that in determining whether there was informed consent to medical treatment the court must decide on the basis of the response of a reasonable person, not the actual state of mind of the plaintiff. Equal application of rules of evidence and substantive law to all litigants inevitably results in manifest unfairness to individuals whose capacities are markedly different from the norm. A trial judge cannot alter it. Loss of earnings is an approved measure of damages that results in high recoveries for those with lucrative positions and scant recovery for those who are unemployed although the needs of the latter for compensation for injuries may be much greater.

Much jurisprudential doctrine is predicated on the assumption that all people are reasonable and will act in accordance with what is in the theoretical best interest of the greatest number of people. *See* RAWLS, A THEORY OF JUSTICE (1972). Other doctrines are based upon the concept of equal and reciprocal obligations and benefits. In fact, the relationships between adult and child, ignorant and educated, rich and poor, male and female are not equal or reciprocal. It is interesting to note that in 1963, Professor Fuller failed to mention the existence of the female and consequently failed to consider the lack of reciprocity between one half of the population and the other half. *See* FULLER, THE MORALITY OF LAW (1964).

51. *See, e.g.,* Moody v. Daggett, 429 U.S. 78 (1976); Herring v. N.Y., 422 U.S. 853 (1975); Gagnon v. Sarpelli, 411 U.S. 778 (1973); Goldberg v. Kelly, 397 U.S. 254 (1970).

The Canons of Judicial Ethics, adopted in 1924,[52] is probably the most vague and inadequate code ever conjured up. It has been said that the Canons are as useful to a judge as a valentine to a heart surgeon. In 1972, a new Code of Judicial Conduct was adopted by the House of Delegates of the American Bar Association.[53] Of the Code's seven Canons, substantial changes are evident only in Canon 5, which regulates extra-judicial activities, and Canon 6, which provides for the filing of reports of compensation for quasi-judicial and extra-judicial activities. The new provisions present modest precatory statements rather than clear and enforceable mandates.[54]

Canon 2A reads as follows: "A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."[55] Such a provision clearly provides little guidance for the judge in the exercise of judicial duties.

The prohibitions with respect to venality, favoritism, and personal ambition present little more than common sense rules. They are as obvious as the Ten Commandments and equally lack self-effectuation.

One of the serious deficiences in the Canons is the failure to acknowledge that a judge owes a duty to the community at large, not merely to the lawyers and litigants who appear before the bench. For example, the judiciary ought to consider very carefully the dilemma that arises when dangers and wrongs are revealed in the course of litigation that affect persons and institutions who are not parties. Does a judge have a duty to inform affected persons? On the other hand, such an action might be viewed as a step outside the bounds of judicial propriety. The threat of such action by a judge might deter witnesses from testifying in court and chill the free exercise

52. ABA CANONS OF JUDICIAL ETHICS (1924).

53. ABA CODE OF JUDICIAL CONDUCT (1972).

54. The discussions with respect to the contents and desirability of the new code of judicial ethics have dealt primarily with judicial abuses—acts of omission or commission about which there is general agreement as to impropriety. The question of affirmative duties of the judiciary to the public at large has been ignored. *See, e.g.*, Kaufman, *Lions or Jackals: The Function of a Code of Judicial Ethics*, 35 LAW AND CONTEMP. PROB. 3 (1970); McKay, *The Judiciary and Nonjudicial Activities*, 35 LAW AND CONTEMP. PROB. 9 (1970); Clark, *Judicial Self-Regulation — Its Potential*, 35 LAW AND CONTEMP. PROB. 37 (1970).

55. ABA CANONS OF JUDICIAL ETHICS No. 2A.

of legal rights. If the judge does not act, the evils revealed may continue unchecked.

Ethical problems arise most frequently not in landmark cases but rather during the course of routine litigation. For example, the evidence in a negligence case might reveal that the hospital in which the plaintiff was operated on was unsanitary and did not meet minimum state standards. Does the judge have a right or a duty to notify the State Board of Hospital Licensure of these conditions? If, in a law suit involving directors of a corporation, it is revealed that corporate assets have been misused by several directors to the detriment of the public shareholders, does the judge have a right or a duty to inform the stockholders that they have been cheated when the parties subsequently settle the suit in order to avoid the recitation of these findings? Would providing such information constitute officious intermeddling in litigation? Police abuse, misconduct by probation officers and other public officials, as well as conditions that constitute a physical hazard to the public, are frequently revealed in the course of litigation. Does a judge have the right or the duty to call this information to the attention of appropriate public authorities?

Every judge encounters many cases in which personal injury litigants have been permanently crippled as a result of medical malpractice. Similarly, every trial judge confronts cases in which unnecessary operations have been performed. Should the judge notify the medical society and the Board of Licensure of these observations? In architectural and legal malpractice cases, gross incompetence is occasionally revealed. Unless the judge notifies the licensure or disciplinary board, the public may be subject to the continuing dangers that result from having incompetents practicing a profession.

The problem of incompetence of legal counsel is particularly serious.[56] Every judge sees plaintiffs who have a very high probability of recovery fail to recover because of incompetent counsel. Judges

56. Note the admission rules for the district courts approved in principle by The Judicial Conference of the Second Circuit requiring lawyers to have taken courses in evidence, civil procedure, criminal law and procedure, professional responsibility and trial advocacy. The committee found that there is a "lack of competency in trial advocacy in the federal courts." *New Admission Rules Proposed for Federal District Courts*, 61 A.B.A.J. 945 (1975). It is generally acknowledged that the level of trial practice in the federal courts is superior to that in most state courts. There is at present, however, no means by which clearly incompetent lawyers can be removed.

also see large and unwarranted verdicts returned against defendants as a result of the incompetence of their attorneys. Cases are often settled in a manner clearly unfair to one of the parties. Does the judge have a right or a duty to intercede when counsel wants to settle? Neither the bar nor the judiciary has addressed the foregoing problems.

In the realm of criminal law, a convicted defendant is entitled to a new hearing (a post conviction hearing) if he can show that he was afforded an inadequate defense by incompetent counsel.[57] No comparable right exists for civil litigants. They must bring a separate suit against their counsel and then prove, first, that they should have won and second, that the adverse result was caused by the incompetence of counsel.

Canon 4 recognizes a limited right of the judiciary to engage in activities to improve the law, the legal system, and the administration of justice. The Canons are, however, significantly silent with respect to the right or duty of a judge to advise with respect to non-legislative matters.

The Canons of Ethics and most courses on professional responsibility deal with overt misconduct, primarily concerning financial involvements of lawyers and judges, conduct that any lay person would recognize as unethical. Recent literature on judicial ethics discusses well-known abuses: extra-judicial compensation,[58] removal of grossly incompetent and corrupt judges,[59] disqualification of judges for interest in litigation.[60] There has been little written that examines the more difficult problems of judicial sensitivity, fitness, and misuses of office for personal aggrandizement that does not involve the taking of money. No one discusses affirmative duties.

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57. *See* Moore v. United States, 432 F.2d 730 (3d Cir. 1970); Bines, *Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus*, 59 VA. L. REV. 927 (1973); Note, *Effective Assistance of Counsel for the Indigent Defendant*, 78 HARV. L. REV. 1434 (1965).

58. *See* ABA SPECIAL COMM'N ON JUDICIAL ETHICS: PRELIMINARY STATEMENT AND INTERIM REPORT (1970). *See also* REDLICH, PROFESSIONAL RESPONSIBILITY, A PROBLEM APPROACH (1976). Significantly, the only problems with respect to judges that Professor Redlich considers are old questions resolved many times. The answers are obvious. The difficult problems that trouble sitting judges are not even suggested.

59. *See* Holloman, *The Judicial Reform Act: History, Analysis and Comment*, 35 LAW AND CONTEMP. PROB. 128 (1970).

60. *See* Judicial Disqualification Act of 1970 (Bayh Act), 28 U.S.C. § 144; Frank, *Disqualification of Judges*, 56 YALE L. J. 605 (1947). Neither the act nor most of the commentators consider other and more subtle types of bias and prejudice. *See* Forer, *Psychiatric Evidence in the Recusation of Judges*, 73 HARV. L. REV. 1325 (1961).

A short but unsatisfactory and simplistic answer to these complicated questions of judicial ethics is the appointment of better judges. For more than thirty-five years the organized bar and the legislature in the various states have been considering the so-called Missouri plan and similar methods of judicial selection. In essence, such plans provide for the appointment of judges by the governor from a panel of approved candidates followed by a nonpartisan election in which the public votes yes or no on the retention of the appointed judge. The legal profession has been chronically bemused by the mechanics of judicial selection at the same time it has ignored the problems of judicial qualifications, ethics, and responsibility.[61] In many jurisdictions, appointment and election to the bench are purely partisan political decisions. The Carter administration has conceded that federal district judges shall be appointed on a political basis, although federal appellate judges shall be appointed from an approved list of nominees.[62] Screening by "blue ribbon panels" has not proved generally effective. Such panels have approved nominees who have been convicted of crimes, who have been suspended from practice of law because of improper conduct, who have never graduated from law school, who have graduated from unaccredited law schools and whose practice and legal experience have been minimal, as well as individuals whose personal lives have been marked by public intemperance and whose business and financial dealings have been marked by unethical and illegal practices.

The press, although frequently critical of the judiciary, seldom examines the records of active judges. Such easily ascertainable facts as the number of times the judge has been reversed for errors of law, the number of retrials that have been occasioned by judicial intemperance and blatant unfairness, the number of judicial appointments to favored friends, and the outside income that may affect judicial decisions are rarely revealed.[63] Unless a judge is being considered for appointment to the United States Supreme Court, the record is not closely scrutinized.[64]

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61. In the last six years the *Index to Legal Periodicals* lists sixty-four articles on judicial selection and removal but only fourteen on judicial ethics. None of these articles addresses the problem of judicial responsibility to the public.

62. N.Y. Times, Feb. 18, 1977, at p. A28, col. 1.

63. Canon 6 suggests disclosure of extra judicial compensation but is silent with respect to financial holdings.

64. The prestigious American Bar Association approved G. Harrold Carswell and Clement Haynesworth for appointment to the federal bench. It was not until they were

Instead of relying heavily on the mechanics of judicial selection, I suggest that certain conditions be imposed upon the judiciary which will deter those who might misuse the office and encourage those who have no ulterior motives or extra-judicial aspirations. Judicial office should be viewed not simply as a job or position but as a vocation. A judge who is entrusted with powers over the liberty and property of people, whose decisions may disrupt families, separate children and parents, and make the difference between poverty and comfort, should view this authority as a solemn trust.

Certain obvious limitations and conditions could be imposed on the judiciary that would tend to discourage those who do not view judicial office as a vocation but rather as an occupation, a stepping stone to further advancement. Such conditions might include: annual disclosure of extra-judicial income and activities as well as financial holdings; permanent disqualification from nonjudicial appointive or elective offices; a cutoff period between leaving the bench and joining a law firm or corporation which has been in litigation before the judge who resigns or retires;[65] and a minimum age requirement for judicial office.

A minimum age for the judiciary may appear to be a startling suggestion, but it is not made lightly. Beginning with the Kennedy administration, a premium apparently has been placed on the appointment of young officials, almost as if youth in and of itself were a particular qualification. While the energy and new ideas of young people are desirable in many activities, youth also has its hazards. Hugh Sloan, Jr., one of the young men involved in the Watergate scandal, warned against placing too great a reliance on bright, eager young people. "Looking back on it, I would have to say youth for youth's sake isn't that good an idea. You had a staff that got overzealous and got carried away . . . ."[66]

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nominated to the United States Supreme Court that an independent investigation was undertaken by outsiders. Both men were subsequently rejected by the U.S. Senate. *See* Grossman & Wasby, *Haynesworth and Parker: History Does Live Again*, 23 S.C.L. REV. 345 (1971).

65. Restrictions established by President Carter for federal executive officers and employees include restrictions on private employment after leaving government. The President's Message to the Congress Urging Enactment of the Proposed Ethics in Government Act of 1977 and Special Prosecutor Legislation, 13 PRESIDENTIAL DOCUMENTS JIMMY CARTER No. 19, at 647 (1977).

66. N.Y. Times, Feb. 17, 1977, at 76, col. 5.

Judgeships are offices peculiarly unsuited for eager zealots, no matter how bright they are. It requires a long view, an appreciation that the burning conviction of today may tomorrow be viewed as arrogant and repressive. Basic human rights and needs cannot be tempered by radical chic or reactionary dogma.

The bench is a passive and reflective position far removed from the active advocacy engaged in by lawyers. Successful, competent lawyers who become judges generally experience some difficulty in adjusting from a life of active involvement and advocacy to the somewhat cloistered and passive judicial role. Lawyers are accustomed to taking a strong and forceful stand on behalf of their clients, to advocating changes in the law, and to engaging actively in political, civic, and charitable affairs. Most of these activities are inappropriate for participation by the judiciary. No one unwilling to forego for the rest of one's professional life such dynamic participation should seek or accept a position on the bench. For a person under the age of fifty, such a choice is difficult to make and practically impossible to adhere to.[67]

Two hundred years ago, when the Constitution established 35 as the minimum age for the President, the average life expectancy was 35.5 years. Today, the average life expectancy of the American male is 68.5 years and for the American female 76.4 years. The public recognizes that in many cases sixty-five is too early an age for retirement. Federal judicial retirement is now mandatory at seventy years of age. Appointment or election at age fifty would permit a judge to serve actively for twenty years. A judge serving longer than twenty years may become a roadblock to progress.

Although law is by its nature a conservative force in society, if a judge is on the bench too many years, he or she is deciding the questions of the day on the basis of experience and education that came thirty to fifty years before. Thus, added to the natural cultural lag of the law, there is the additional period of the judge's years on the bench, which may result in decisions that are two generations out of date.

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67. But see the recent appointment of Rose Bird, age 40, to the California Supreme Court. She was graduated from law school in 1965. N.Y. Times, Feb. 14, 1977, at 48, col. 1. Ms. Bird could serve thirty years on the court.

Conclusion

In the last half century since the Canons of Judicial Ethics were adopted the population of the United States has more than doubled. The amount of litigation has increased enormously and disproportionately. Our society and our laws have undergone extraordinary changes. The rights of women, children, the aged, minorities, the mentally handicapped, and prisoners have undergone tremendous development in the past fifty years. No aspect of law has remained static for this half century except judicial ethics.[68]

During this period, the judiciary has imposed new and more rigorous standards of fair dealing and responsibility upon professionals, industry, and ordinary citizens.[69] Should not these concepts also apply to the judiciary?

There should be a covenant or compact between the judge and society. At present judgeships are invested with trappings and ceremonies. Robes of office surround the bench and the law with almost sacramental authority. But, if judges do not act with the morality and dedication required, they shall soon become black-robed priests presiding over a dying secular religion.

One who accepts a position on the bench should do so knowing that it is a hard, demanding job that has few of the satisfactions of legal practice. The bench is not financially lucrative and the satisfactions of wealth are missing. The thrill of winning is gone. The judge never wins but, rather, is often severely criticized in the press, subjected to barrages of hostile literature, picketing and malicious accusations by persons who disagree with a particular decision. The satisfactions of public approval and acclaim are seldom the rewards of a good judge. A judge must gain satisfaction through dedication to the administration of justice.

Ethics has been defined as the principle of what "ought to be." If law is to be credible, it must be consonant with human rights and morality. The judiciary must, therefore, be concerned with what law ought to be and what the duties of a judge ought to be.

68. The Code does not substantially alter the Canons, nor does it include the public obligations and the personal restrictions herein proposed.

69. For example, anger invites rescue was first enunciated in 1921. Wagner v. International Ry. Co., 232 N.Y. 176, 133 N.E. 437, 191 N.Y.S. 64 (1921).

This concern with ethics and morality implies neither sectarianism nor theological belief. It does require a sense of vocation, a calling to do justice based on humanism and individual conscience entirely compatible with a pluralistic, secular state.

The courts are the ultimate guardians of the rights of all Americans. Two millenia ago, Juvenal asked *"Quis custodiet ipsos custodes?"* to which there has as yet been no satisfactory answer. Judges who are the guardians can no longer hide behind their robes of office. They must apply to themselves at least the same standards which they have imposed on others. It is time to acknowledge judicial accountability and responsibility to the public.